Supreme Court, U.S.
FILED

No. _____ 09-422 OCT 6 - 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

PATRICK MURTAGH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Upon a showing of gross negligence by the taxpayer's counsel, did the Tax Court have the jurisdiction to vacate judgment entered by default, when the motion to vacate was filed more than 90 days after the decision of the tax court was entered?

LIST OF ALL PARTIES TO THE PROCEEDINGS

1) Patrick Murtagh – Petitioner – Taxpayer

2) Commissioner of Internal Revenue Service – Respondent

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The Opinions of the Court of Appeals and the United States Tax Court are unreported and are reproduced in the appendix.

STATEMENT FOR THE BASIS OF JURISDICTION OF THE SUPREME COURT

(a) Judgment entered June 22, 2009.

(b) No rehearing requested below. An extension of time requested and received on application to file the Writ of Certiorari until October 6, 2009.

(c) No cross petition of Certiorari would be expected in this matter.

(d) The statute provision relied upon for Certiorari is 28 U.S.C. § 1254.

(e) The notifications required by Rule 29.4(b) or (c) have been made by counsel for the Petitioner.

(f) Basis for Federal Jurisdiction below.

(1) Jurisdiction was conferred in this matter to the U.S. Tax Court pursuant to 26 U.S.C. § 6213 upon timely filing for a petition for redetermination of a deficiency.

(2) Exclusive jurisdiction was conferred upon the United States Court of Appeals to review final decisions of

the US Tax Court pursuant to 26 U.S.C. § 7482.

(3) The Tax Court decision in this matter denying the Petitioner leave to file a Motion to Vacate was filed on August 25, 2008. The Appeal to the Court of Appeals for the First Circuit was noted within 90 days by mail on October 17, 2008. No bond is required on this Appeal as the Petitioner-Taxpayer has paid the taxes in full.

(4) The decision of the Tax Court dated August 25, 2008 is a final decision conferring jurisdiction upon the Court of Appeals for the First Circuit.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCE, AND REGULATIONS INVOLVED IN THIS CASE ARE AS FOLLOWS:

THE COURT RULES

Rule 123 Default and Dismissal

* * *

(b) Dismissal: For failure of a petitioner properly to prosecute or comply with these Rules or any order of the Court or for other cause which the Court deems sufficient, the Court may dismiss a case at any time and enter a decision against the petitioner. The

Court may, for similar reasons, decide against any party any issue as to which such party has the burden of proof, and such decision shall be treated as a dismissal for purposes of paragraphs (c) and (d) of this Rule.

* * *

(d) Effect of Decision of Default or Dismissal: A decision rendered upon a default or in consequence of a dismissal, other than a dismissal for lack of jurisdiction, shall operate as adjudication on the merits.

Rule 162 Motion to Vacate or Revise Decision

A motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decisions as been entered, unless the Court shall otherwise permit.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60 Relief from a Judgment or Order

* * *

(b) Grounds for Relief from a Final Judgment, Order or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) **Timing and Effect of the Motion**.

(1) *Timing*. A motion under rule 60(b) must be made within a reasonable time-and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of proceeding.

(2) *Effect on Finality*. The motion does not affect the judgment's finality or suspend its operation.

(d) **Other Powers to Grant Relief**. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, ordering or proceedings;

(2) Grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

STATEMENT OF THE CASE

(a) Statement of Facts

The Taxpayer, Patrick Murtagh, is an Irish immigrant who has limited education and whose principal occupation is that of a plasterer (App.12). At a certain time beginning in 1998, Mr. Murtagh began the development of five condominium units in South Boston, Mass. (App.12). As a result of an Internal Revenue Service audit of the Appellant's 1999-1040 and 2000-1040 tax returns, 90-day notices of deficiency were issued by the Internal Revenue Service for 1999 and 2000 (Docket No. 001, App.9). Mr. Murtagh filed a timely Tax Court Petition challenging the notices of deficiency and alleging principally that the five condominium units were held for investment and that he was not a dealer to whom ordinary income status would be appropriate (App.14). The Tax Court Petition was filed by Attorney John J. Lyons ("Lyons") on behalf of Mr. Murtagh (App.12).

Interrogatories and a request for production of documents were served on Lyons by the Attorney for the Internal Revenue Service but said discovery

requests were not forwarded to Mr. Murtagh (App.16). A motion to compel answers was also served on Lyons and also not forwarded to Mr. Murtagh (App.16). Lyons took no action to respond to either the discovery requests or to the motion to compel. The Tax Court Petition of the taxpayer was dismissed for failure to prosecute and the deficiencies for 1999 and 2000 were affirmed by the Tax Court (App.5).

Lyons did not appear before the Tax Court on March 13, 2006 when the case was called (App.5). Mr. Murtagh was not informed by Lyons or by the Court of the disposition of the case until he was so informed during collection proceedings in July, 2007 (App.13).

Mr. Murtagh retained the undersigned attorney to represent him in the collection proceedings (App.13). Mr. Murtagh paid all taxes, penalties and interest for 1999-1040 and 2000-1040 (App.13). He filed amended returns for 1999 and 2000 seeking refunds for 1999 and 2000 (App.14). Mr. Murtagh received a refund for 1999, and the 2000-1040 refund claim was held for audit (App.13).

The reduction in income presented in Mr. Murtagh's amended returns for 1999 and 2000 is based on proper crediting of his basis in the property sold (App.14). Neither of his prior representatives had considered as part of his basis checks paid to the General Contractor *after* the sale of the fifth condominium sold in 2000 (App.14). The amended returns filed for 1999-1040 and 2000-1040 address

Taxpayer's basis in the property sold and both amended returns concede that Taxpayer's is a dealer (App.14).

(b) Statement of Proceedings

A 90-day statutory notice of deficiency was sent to the Petitioner by the Internal Revenue Service on February 17, 2005 for 1999-1040 and for 2000-1040 (Docket No. 001, App.9). A timely petition was filed by the Petitioner through counsel on May 18, 2005 (App.9). The IRS filed an Answer to the Petition on July 7, 2005 (Docket No. 003, App.9). On October 6, 2005, the Tax Court set the matter for trial for March 13, 2006 (Docket No. 004, App.9). Petitioner's counsel below, John J. Lyons (hereafter "Lyons"), did not provide the notice of trial date to Petitioner (App.16). On November 9, 2005, counsel for the IRS served on Lyons discovery requests pursuant to *Branerton Corp. v. Commissioner*, 61 T.C. 691 (1974) (Docket No. 006, App.10). Lyons did not notify Petitioner of these discovery requests (App.10). Counsel for the IRS moved to compel discovery responses from Petitioner on January 17, 2006 (Docket No. 006, App.10). Lyons did not respond to the IRS motion to compel discovery and did not notify his client of the IRS motion (App.15). The Court issued an order compelling discovery by February 6, 2006 (Docket No. 007, App.10). Counsel for the IRS filed on March 13, 2006, the date the case was to be heard for trial, a motion to dismiss for lack of prosecution and that judgment be entered for the amount of the deficiencies (Docket No.

0010, App.10). An order of dismissal and decision was entered by Judge Harry A. Haines on March 31, 2006 (Docket No. 0011, App.10), Lyons having failed to appear or to respond (App.10). Lyons did not notify his client, the Petitioner, of the Court's findings (App.16).

When Petitioner discovered that his case had been dismissed, Petitioner, through new counsel, filed a Motion to Vacate Judgment on or about July 24, 2008 (Docket No. 0016, App.10). Petitioner's former counsel Lyons submitted an affidavit in support of Petitioner's motion to vacate judgment in which he stated under oath that he not only abandoned the Petitioner by failing to respond to discovery deadlines but that he also did not notify the Petitioner of his abandonment until a year and a half later (App.15). The Tax Court returned said motion and requested from counsel a motion for leave to file a motion to vacate. On August 12, 2008, Petitioner through counsel filed a motion for leave to file a motion to vacate, a motion to vacate judgment and an entry of appearance (Docket No. 0015, App.10). On August 26, 2008, Judge Haines denied Petitioner's motion for leave to file a motion to vacate (App.3). Petitioner filed a Timely Notice of Appeal to this Order on or about October 27, 2008 (Docket 0017, App.11).

On June 22, 2009, the Court of Appeals for the First Circuit affirmed the Tax Court's decision "based on the heightened importance of finality with tax

court decision and in light of the delay engaged in by the Appellant. . . ." (App.1).

ARGUMENT

The Court of Appeals for the First Circuit erred in its decision summarily affirming the tax court's decision to deny leave to file a motion to vacate judgment. The Tax Court has the equitable power in compelling circumstances[1] to entertain a motion to vacate judgment filed beyond the 90 day period after the tax court judgment has been entered.

The Tax Court abused its discretion when it denied Mr. Murtagh the opportunity to even file a motion to vacate the judgment entered against him due to his former counsel's inexcusable and unconscionable abandonment of his client. Consequently, Mr. Murtagh was denied the opportunity to present to the Tax Court viable and winnable grounds for a refund of the taxes paid by him – grounds not previously presented to the Tax Court or to the

[1] It is well established that the Tax Court may vacate judgment beyond the 90 day period after the Tax Court judgment has been entered where there has been a showing of fraud on the court. See *Drobny v. Commissioner of Internal Revenue*, 113 F.3d 670, 677 (7th Cir. 1997) citing *Curtis v. Commissioner of Internal Revenue*, 72 TCM (CCH) 369, 371, 1996 WL 453870 (1996) and *Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, 690 (7th Cir.), *cert. denied*, 393 U.S. 841, 89 S.Ct. 121 L.Ed.2d (1968).

Internal Revenue Service. The Tax Court did not even reach the merits of Mr. Murtagh's petition to vacate judgment; it denied Mr. Murtagh's motion for leave to even file his motion to vacate, on the grounds that it was filed late.

Although ordinarily motions to vacate must be filed within thirty days after a decision has been entered, the Tax Court has discretion to allow a late filing. Tax Court Rule 162, 26 U.S.C. foll. § 7453. "Leave to file untimely motions and the granting of such motions are addressed to the sound discretion of the Court. We are guided primarily by whether it would be in the interest of justice to vacate the prior decision." *Estate of Luis G. Egger v. Commissioner of Internal Revenue*, 92 T.C. No. 67, 92 T.C. 1079 (May 22, 1989) (internal citation omitted). When interpreting the scope of the Tax Court's discretion pursuant to Tax Court Rule 162, the Courts may look to cases interpreting the Federal Rules of Civil Procedure, including Rule 60, as precedents. *Etter v. Commissioner of Internal Revenue*, T.C. Memo 1991-43, 1991 WL 10967 (U.S. Tax Ct. 1991).

Rule 60(b) permits the Court to relieve a party from " . . . a final judgment, order or other proceeding" for a variety of reasons, including "mistake, inadvertence, surprise, or excusable neglect," and, if none of the reasons listed in Rule 60(b)(1)-(5) is applicable, for "any other reason that justifies relief." Fed.R.Civ.P. Rule 60(b)(6). Clause (6) has been "' . . . considered the grand reservoir of the court's equitable power to do justice in a particular case when relief is

not warranted by the preceding clauses.'" *United States v. Cirami*, 563 F.2d 26, 32 (2nd Cir. 1977), quoting 7 Moore's Federal Practice P6027(2), at 375 (2d ed.rev. 1975); *Chang v. Smith*, 103 F.R.D. 401, 404 (D. Puerto Rico 1984). In a proper case, this equitable power should be "liberally applied," although a "proper case" requires "exceptional circumstances." *United States v. Cirami*, 563 F.2d at 32; *Chang,* 103 F.R.D. at 404.

> In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified [in FRCP 60(b)(1) through 60(b)(5)], vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

Shoshone-Bannock Tribes of the Fort Hall Reservation v. Leavitt, 408 F.Supp.2d 1073, 1080-1081 (D. Oregon 2005), quoting from *Klapprott v. United States*, 335 U.S. 601, 614-615, 69 S.Ct. 384, 93 L.Ed. 266 (1949).

This matter presents the "exceptional circumstances" that merit not only the Court's exercise of its discretion to permit Mr. Murtagh to file his motion for leave to vacate, but also justify the allowance of his motion for leave to vacate. Mr. Murtagh, a poorly-educated immigrant, was completely abandoned by Lyons, his former counsel. This conduct falls outside of the purview of the first five clauses of Rule 60; there is no excuse for such conduct – indeed, in his affidavit, Lyons offered none. This is extraordinary, gross, almost willful negligence. While ordinary

negligence is not grounds for relief under Rule 60(b)(6), gross negligence is grounds for relief. *Boughner v. Secretary of Health, Education and Welfare*, 572 F.2d 976, 978, note 9 (3rd Cir. 1978); *Chang,* 103 F.R.D. at 404; *Brooks v. Walker*, 82 F.R.D. 95, 97 (D. Mass. 1979); *King v. Mordowanec*, 46 F.R.D. 474, 478 (D.R.I. 1969). "Gross neglect and abandoning of client by attorney create an exception to the rule that a client is bound by the acts of an attorney; and also constitute extraordinary circumstances permitting relief from a judgment under Rule 60(b)(6)." *Boughner*, 572 F.2d at 978, note 9, citing *Lucas v. Juneau*, 20 F.R.D. 407 (D. Alaska 1957) and 15 A.L.R. Fed. 193.

Indeed, the facts of this case are strikingly like those presented in *King v. Mordowanec*. In that case, the plaintiffs suffered personal injuries in an automobile accident. The plaintiffs retained counsel to represent them in their action against the defendant, and the plaintiffs filed a complaint and counsel entered his appearance. The defendant propounded interrogatories to the plaintiffs. The case was called on the Court's calendar several times, and was exempted from dismissal once. Finally, a notice of pending dismissal was again sent to counsel for both sides, and the case was ultimately dismissed. Plaintiffs' counsel filed a motion to vacate pursuant to Rule 60(b)(1), which was denied. The plaintiffs appealed (and filed a second action). Plaintiff 's new counsel argued that the gross neglect of plaintiff's

former counsel merited relief pursuant to Fed.R.Civ.P. Rule 60(b)(6).

The Court agreed, noting that " . . . it was not until very recently that Mr. King became aware of the gross neglect of his former counsel." *King v. Mordowanec*, 46 F.R.D. at 478. The Court also found that gross neglect, unlike ordinary neglect, is outside of the purview of Rule 60(b)(1), and therefore comes within the scope of Rule 60(b)(6), so long as the client was not aware of his attorney's negligence, and did not participate in it[2]. *Id.* Similarly, Mr. Murtagh did not become aware of the gross neglect of his former counsel until July, 2007, almost a year-and-a-half after the dismissal of his petition by the Tax Court in March, 2006. Lyons has offered no explanation for his utter failure to do work at all on Murtagh's behalf after filing the petition. He did not respond to the required discovery, nor did he appear in the Tax Court as required. Mr. Murtagh, a plasterer by trade, with limited education, relied upon his attorney to navigate the complex waters of the Tax Court. In

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[2] The Court distinguished the case of *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), which dealt only with the dismissal of a case pursuant to Rule 41(b) for failure to prosecute, but which expressly left open whether relief might be had pursuant to Rule 60(b). *King v. Mordowanec*, 46 F.R.D. at 478. The Court pointed out that *Link* suggests that Rule 60(b) may be the vehicle through which clients who suffer from dismissals pursuant to Rule 41(b) as the result of sloppy lawyering might find relief. *King v. Mordowanec*, 46 F.R.D. at 478-479.

such circumstances it would be the grossest injustice to visit the sins of the attorney upon the client. See, *Boughner*, 572 F.2d at 979 ("To permit these judgments to stand, in light of Krebel's conduct and the absence of neglect by the parties, would be unjust." – here, relief afforded to client abandoned by counsel.). This is particularly true here, where as a result of Lyons' gross negligence Mr. Murtagh has suffered severe hardship – the unnecessary payment of taxes on income that represents recovery of his capital extended to build the condominiums sold.

Treasury Regulation 1.162-1 provides clearly that "Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business. . . ." The Regulation continues, "The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. . . . Among the items included in business expenses are management expenses, commissions, labor, supplies. . . ."

Thus, the Treasury Regulations provide, and Mr. Murtagh ought to be afforded the opportunity to offset his gross income in the years in question with expenses incurred for materials, supplies, labor and management expenses.

Had the Tax Court afforded Mr. Murtagh the relief he sought, and exercised its discretion to permit him to file his motion to vacate the judgment (and

then vacated the judgment), Mr. Murtagh would have had the opportunity to make his case that he is entitled to a refund of the taxes that he paid. However, due to the gross negligence of his counsel, he will be denied this opportunity unless this Court grants him relief.

CONCLUSION

The Tax Court abused its discretion when it denied the Appellant, Patrick Murtagh, special leave to file a motion to vacate the default judgment, and further erred in not considering his petition to vacate the default judgment. Mr. Murtagh respectfully requests that this Court grant this Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

ALFRED D. ELLIS
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Dated: October 6, 2009

United States Court of Appeals
For the First Circuit

No. 08-2402

PATRICK MURTAGH,

Petitioner, Appellant,

v.

COMMISSIONER OF IRS,

Respondent, Appellee.

Before

Lynch, *Chief Judge*,
Torruella and Howard, *Circuit Judges*.

JUDGMENT

Entered: June 22, 2009

Appellant seeks review of the tax court's denial of his motion for leave to file a motion to vacate a decision entered against him in 2006. In light of the heightened importance of finality with regard to tax court decisions and in light of the delay engaged in by Appellant, both from the time the tax court entered its decision and from the time Appellant concedes he learned of that decision, we conclude that the tax court's decision was reasonable and did not mark an abuse of discretion.

Accordingly, the decision of the tax court is **AFFIRMED**, and the appeal is **DISMISSED**.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

cc:
Ellis, Alfred D.
Korb, Donald L.
Lyon, Kathleen F.
Rowan, Bridget Maria

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PATRICK MURTAGH,	)	
Petitioner	)	
	)	
v.	)	**Docket No. 9608-05**
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
RESPONDENT	)	

ORDER

On August 12, 2008, petitioner Motion for Leave to File a Motion to Vacate Judgment. A brief review of the history of this case provides a proper context for petitioner's motion.

This case was calendared for the Court's Boston, Massachusetts, Trial Session beginning March 13, 2006. Petitioner's counsel did not appear at Calendar Call. On March 31, 2006 the Court granted respondent's Motion to Dismiss for Lack of Prosecution and entered an Order and Decision for respondent.

In his new motion, petitioner claims that he received ineffective assistance of counsel and was never made aware of the Court's decision until a collection hearing held in July, 2008.

Rule 162 specifies that any motion to vacate or revise a decision shall be filed within 30 days after the decision has been entered, unless the Court should otherwise permit. Although we are mindful of

petitioner's hardships, his request for this Court to vacate a decision rendered over two years ago is an extraordinary remedy, and not warranted by the facts of this case.

Upon due consideration of the forgoing, it is

ORDERED that petitioner's Motion for Leave to File a Motion to Vacate Judgment is denied.

/s/ _____
Harry A. Haines
Judge

Dated: Washington, D.C.
August 25, 2008

SERVED AUG 26 2008

UNITED STATES TAX COURT

WASHINGTON, DC 20217

PATRICK MURTAGH,	)	
Petitioner	)	
	)	
v.	)	**Docket No. 9608-05**
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
RESPONDENT	)	

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the Trial Session of the Court at Boston, Massachusetts on March 13, 2006. There was no appearance by or on behalf of petitioner. Counsel for respondent appeared and filed a motion with the Court to dismiss for lack of prosecution. Upon due consideration, and for cause more fully appearing in the transcript of the proceedings, it is

ORDERED that respondent's motion to dismiss is granted, and this case is dismissed for lack of prosecution.

ORDERED and DECIDED that there are deficiencies in income tax and penalties under Internal Revenue Code Section 6662(a) due from the petitioner as follows:

Year	Deficiency	Penalty I.R.C. Section 6662(a)
1999	$61, 903.00	$12,381.00
2000	$57,177.00	$11,435.00

/s/ Harry A. Haines Judge

ENTERED: March 31, 2006

UNITED STATES TAX COURT

WASHINGTON, DC 20217

PATRICK MURTAGH,	)	
Petitioner	)	
	)	
v.	)	**Docket No. 9608-05**
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
RESPONDENT	)	

ORDER

The above-docket case is calendared for the trial session beginning on March 13, 2006, in Boston, Massachusetts.

On January 18, 2006, the Court filed respondent's Motion to Compel Responses to Interrogatories and Production of Documents. In the motion, respondent's counsel, Jamie J. Song, represents that: (1) On November 9, 2005, respondent sent a letter to petitioner's counsel, John J. Lyons, informally requesting answers to certain questions and production of certain documents; (2) on December 8, 2005, pursuant to Tax Court Rule 71, respondent served on petitioner's counsel Respondent's Interrogatories; (3) on December 8, 2005, respondent served on petitioner's counsel Respondent's Request of Production of Documents; and (4) on January 6, 2006, respondent's counsel left a voice mail with petitioner's counsel inquiring as to the status of the interrogatories and production of documents. Respondent's counsel further represents

that petitioner's counsel has not responded to any of respondent's requests.

Upon due consideration, it is

ORDERED that respondent's Motion to Compel Responses to Interrogatories and Production of Documents is granted in that petitioner shall, on or before February 6, 2006, serve on counsel for respondent answers to Respondent's Interrogatories. It is further

ORDERED that petitioner shall, on or before February 6, 2006, produce to counsel for respondent those documents requested in Respondent's Request for Production of Documents. It is further

ORDERED that in the event petitioner does not fully comply with the provisions of this order, this Court will be inclined to impose sanctions pursuant to Tax Court Rule 104, which may include dismissal of this case and entry of a decision against petitioner.

/s/ Harry A. Haines
Judge

Dated: Washington, D.C.
January 19, 2006

11/19/08

UNITED STATES TAX COURT
DOCKET ENTRIES

Docket No. 9608-05 INDEX

Patrick Murtagh

v.

COMMISSIONER OF INTERNAL REVENUE

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NO.	DATE	FILINGS AND PROCEEDINGS
0001	05/24/05	PETITION Filed:Fee Paid
0002	05/24/05	DESIGNATION of Trial at Boston, MA
0003	07/08/05	ANSWER (C/S 07/07/05)
0004	10/06/05	NOTICE of Trial on 03/13/06 at Boston, MA.
0005	10/06/05	STANDING PRE-TRIAL ORDER attached to Notice of Trial

0006	01/18/06	MOTION by resp. to compel responses to interrs. & docus. w/Exhs. (C/S 1-17-06)
0007	01/19/06	ORDER mot. (6) to compel responses to interr. & docu. Gr.
0008	02/10/06	MOTION by resp. for sanctions. (C/S 2/9/06) DN 03/13/06
0009	03/13/06	HEARING before Judge Haines at Boston, MA Recalled 3/13. Resp. mot. for sanctions filed 2-10-06 DENIED AS MOOT.
0010	03/13/06	MOTION by resp. to dismiss for LOP. (C/S 3-13-06)
0011	03/31/06	ORDER OF DISMISSAL AND DECISION ENTERED, Judge Haines. Mot. (10) to dismiss for LOP Gr.
0012	04/07/06	TRANSCRIPT of 3-13-06 rec'd. (Cal Call)
0013	04/07/06	TRANSCRIPT of 3-13-06 rec'd. (Recall)
0014	08/12/08	ENTRY OF APPEARANCE by Alfred D. Ellis. (Per Judge)
0015	08/12/08	MOTION by petr. to file mot to vacate judgment (Dec.) (Mot. to vacate Ld.) (Per Judge)
0016	08/25/08	ORDER Mot. (15) to file mot to vacate judgment (Dec.) Dn.

APPELLATE PROCEEDINGS

0017	10/27/08	NOTICE OF APPEAL by petr(s). to U.S.C.A., 1st Cir. (C/S 10/17/08) Fee pd. 11/12/08.
0018	10/31/08	NOTICE of Filing w/ copy of Not. of App. sent to the parties.

UNITED STATES TAX COURT

Patrick Murtagh	)	
	)	
Petitioner	)	**DOCKET NO. 9608-05**
	)	
Vs.	)	**MOTION TO VACATE**
	)	**JUDGEMENT**
Commissioner of Internal Revenue	)	**(Decision)**
	)	
Respondent	)	
	)	

Now comes the petitioner through new counsel Alfred D. Ellis and hereby moves to vacate the judgment entered on March 31, 2006, Petitioner attaches as Exhibit A to this Motion to Vacate Judgment the affidavit of prior counsel John J. Lyons. For reason, to vacate the judgment. Petitioner represents as follows:

(1) The petitioner is an Irish immigrant who has limited education and whose principal occupation is that of a plasterer. In the underlying petition regarding 1999-1940 and 2000-1040, the petitioner was developing five units in South Boston, Massachusetts, his first venture beyond his plastering business.

(2) That the petitioner was defaulted in the underlying action for failure to answer interrogatories and to produce documents. (see docket).

(3) That the petitioner was never sent the interrogatories or the request for Production of Documents. (Exhibit A, Paragraph 4).

(4) That the petitioner was never sent a copy of the Motion for Default or the Notice of the Tax Court Judgment entering against him. (Exhibit A, Paragraph 7).

(5) That the petitioner did not learn that he had been defaulted until July, 2008 at a collection hearing collection hearing attended by the Taxpayer and Attorney Lyons. (Exhibit A, Paragraph 8).

(6) That the Petitioner retained the undersigned attorney to represent him in the collection proceedings. After payment of the underlying taxes penalties and interest for 1999-1040 and 2000-1040 in the approximate amount of $235,000 with proceeds taken from sales proceeds from sales of two condominium units in a 2007 transaction, the undersigned attorney filed amended returns seeking refunds of taxes paid for 1999-1040 and for 2000-1040. (Exhibit "B" and "C").

(7) That the Petitioner received a refund for 1999-1040. For the 2000-1040 year, the Internal Revenue Service assigned the matter for audit to Revenue Officer, Elizabeth Keating. That said audit is being held in abeyance while this motion is pending.

(8) That the reduction in income presented in Petitioner's amended returns for 1999 and 2000 is based on proper crediting of his basis in the property sold. Neither his prior accountant nor his attorney properly considered the checks paid to the general contractor in preparing his 1040-1999 and 1040-2000, which checks were principally made after the last unit was sold in 2000.

(9) Moreover, the sole issue presented in the Tax Court petition as filed was whether or not the Petitioner was a "dealer" in the condominium units or whether the units were held for investment, and the penalties and interest generated as a result of not reporting the income as ordinary income.

(10) The amended returns Exhibits B and C attached deal exclusively with Petitioner's basis in the property sold and concede that the taxpayer is a dealer (Exhibit B 1040X-1999 and Exhibit C 1040X-2000).

(11) Petitioner has no other remedy than this Motion to Vacate in order to receive credit for his basis paid in the five condominium units sold.

Accordingly, Petitioner through counsel hereby request that the judgment be vacated.

Respectfully submitted

/s/ Alfred D. Ellis
Tax Court No. EA0059
Attorney for Petitioner
Zimble & Brettler, LLP
21 Custom House Street
Boston, MA 02110

AFFIDAVIT OF JOHN J. LYONS **EXH. "A"**

Now comes JOHN J. LYONS who swears under oath as follows:

(I) That he is a member of the Massachusetts Bar with a principal office located at 161 Granite Avenue, Dorchester, Massachusetts.

(2) That he was retained to represent Patrick Murtagh and to file and prosecute a Tax Court action involving deficiencies for 1040-1999 and 1040-2000.

(3) That he filed a Tax Court petition on behalf of Patrick Murtagh Tax Court No. 9608-05.

(4) That interrogatories and request for documents were served on the undersigned attorney, but through inadvertence and neglect were not forwarded to the client.

(5) That a motion to compel answers to interrogatories and to produce documents was served on the undersigned October 6, 2005, but through inadvertence were not forwarded to the client.

(6) That as a result of failing to submit answers to interrogatories and to produce documents, the petition was dismissed by Judge Heams on March 31, 2006.

(7) That the undersigned attorney did not notify Patrick Murtagh that he had been defaulted and that the court had entered an order to dismiss.

(8) That during July, 2007 he attended a collection hearing with IRS collection hearing with IRS collection officer Jane T. Kelly and with Patrick Murtagh. At that hearing, Mr. Murtagh learned for the first time that he had been defaulted for failing to answer interrogatories and to produce documents.

Sworn To this 18th day of July, 2008

/s/ John T. Lyons

COMMONWEALTH OF MASSACHUSETTS

Suffolk County

On this 18 day of July 2008, before me, the undersigned notary public, personally appeared John T. Lyons, proved to me through satisfactory evidence of identification, which was [x] photographic identification with signature issued by a federal or state governmental agency, oath or affirmation of a credible witness, [x] personal knowledge of the undersigned, to be the person whose name is signed on the preceding or attached document(s), and acknowledged to me that he/she signed it voluntarily for its stated purpose.

(*official seal*)

/s/ Alfred D. Ellis
Notary Public
My Commission Expires:

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petitioner's Motion to Vacate Judgment was served on counsel for Respondent by mailing same on this 22 day of July 2008 in a postage paid wrapper addressed as follows:

Jamie Song
Tip O'Neil Bldg.
10 Causeway Street
Rm. 401
Boston, MA 02222

/s/ Alfred D. Ellis
Alfred D. Ellis